AmFinance Bhd v Ultimate Eight Sdn Bhd & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–1182 OF 2010

B

RAMLY ALI, MAH WENG KWAI AND DAVID WONG DAK WAH JJCA

1 AUGUST 2013

C

Contract — Agreement — Breach — Right to repossession denied — Termination — Refund of moneys paid — Whether a valid and enforceable hire purchase agreement entered — Whether appellant breached agreement by not repossessing equipment — Whether a valid letter of credit established by appellant in favour of first respondent — Whether letters of guarantee and indemnity provided by second, third and fifth respondents valid and enforceable — Whether second, third and fifth respondents validly discharged as guarantors in respect of hire purchase agreement — Appellant unilaterally dated second set of documents — Whether valid reasons for execution of second set of documents established — Whether first respondent prejudiced by unilaterally dating second set of documents

D

E

Contract — Guarantee — Surety — Letter of guarantee and indemnity — Second set of documents signed by second, third and fifth respondents without any qualification — Whether second, third and fifth respondents knew or ought to have known that letter of guarantee and indemnity would be unilaterally dated by appellant — Whether a continuing guarantee — Whether could be revoked by surety at any time — Whether second, third and fifth respondents relieved of the liability under letter of guarantee — Contracts Act 1950 s 83

F

G

Evidence — Documentary evidence — Admissibility of — Computer generated documents — Whether documents correctly admitted — Evidence Act 1950 ss 65 & 90A

H

The appellant claimed against the first respondent for an order of delivery of a specified set of printing equipment ('the equipment') purchased under the hire purchase agreement. Their claim was premised on a hire purchase agreement entered into between the appellant as the owner and the first respondent as the hirer of the equipment. The appellant's claim against the second, third and fifth respondents was based on two joint and several letters of guarantee and Indemnity in the due performance and observance of the hire purchase agreement. In this case, the appellant approved the first respondent's application for a hire purchase facility. The respondents had signed the first set of documents at the office of the appellant in July 1997. About four months

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later, the appellant forwarded the second set of documents to the respondents for their re-execution. The reason for doing so was because the employment of the earlier officer who handled the case was terminated. The respondents were also required to make payment of commission for establishing the letter of credit. The first respondent returned the second set of documents duly executed in escrow to the appellant. The hire purchase agreement in the second set of documents was duly signed by the appellant and was dated 23 January 1998. Following the completion of the hire purchase agreement by the appellant, the loan sum of RM1m was disbursed on the same day, that is, 23 January 1998. The 'balance sum' from the RM1m facility was paid to the first respondent on 27 February 1998. The first respondent in breach of cl 6 of the hire purchase agreement failed to return the equipment to the appellant and denied the appellant's right to repossess the same. The trial judge held that 'no genuine grounds were put forward by the plaintiff for not proceeding to enforce an earlier set of hire purchase agreement and letter of indemnity and guarantee signed by the defendants', referring to the first set of documents. Being dissatisfied with the said decision, the appellant appealed to this court. The issues raised for the determination of this court, inter alia, were as follows: whether there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent and if so, whether the appellant was in breach of the said agreement by not repossessing the equipment; whether there was a valid letter of credit established by the appellant in favour of the first respondent; whether the two letters of guarantee and indemnity provided by the second, third and fifth respondents were valid and enforceable; and whether the second, third and fifth respondents had been validly discharged as guarantors in respect of the hire purchase agreement.

Held, allowing appeal with costs:

(1) The appellant had satisfactorily explained the reason why the first set of documents was not used. A perusal of the notes of evidence showed that PW1 in her cross-examination had explained to the court that her manager had instructed her to have the documents re-signed by the respondents as the employment of the 'earlier officer who handled the case was terminated'. That was at the discretion of the appellant and there does not seem to be any misuse or abuse in the exercise of that discretion (see para 28(l)).

(2) The respondents had returned the second set of documents duly signed in escrow to the appellant without any query or reservation whatsoever. Further, as the respondents had signed the documents in escrow, this impliedly meant that they were quite happy to let the appellant utilised this set of documents and to insert the date to complete the transaction. It was this set of documents that was dated 23 January 1998 by the appellant. The appellant had dated the second set of documents on 23 January 1998 not out of 'bad faith' but because the letter of credit was

only established on the 23 January 1998 and the loan sum was disbursed on the same day. Further, the first respondent knew well that the loan sum could only be disbursed after the letter of credit had been established (see para 28(o)).

(3) The learned judge fell into error when he held that the hire purchase agreement and the two letters of guarantee were unenforceable merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and had utilised this set of documents instead of the first set of documents signed on 30 July 1997. At the end of the day, only one set of documents was relied on by the appellant to complete the hire purchase transaction and there was only one drawdown of the loan facility. It was not as though the respondents are also being held liable by the appellant under the first set of documents as well. Apart from the time difference of about six months, no prejudice had been caused to the respondents by the appellant dating the second set of documents on 23 January 1998. If the respondents had suffered any loss due to the delay, it was entirely up to them to plead a set off in defence and to raise a counterclaim (see para 28(u)).

(4) It was incumbent upon the first respondent to deliver up the equipment upon its default of payment. There was no contractual duty imposed on the appellant to enter the premises of the first respondent to repossess the equipment. However, notwithstanding the legal position, the appellant did attempt to repossess the equipment from the first respondent's premises but without success as the appellant was denied entry. Therefore, there was no breach of this requirement by the appellant (see para 30(a)–(b)).

(5) The guarantee provided by the second, third and fifth respondents in this instance, was a specific guarantee. Section 83 of the Contracts Act 1950 provides that a continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor. However in this case, the letter of guarantee in respect of the hire purchase agreement was a single and current transaction. Hence, the second, third and fifth respondents cannot be relieved of their liability under the letter of guarantee in respect of the hire purchase agreement (see para 33(c)).

[Bahasa Malaysia summary

Perayu menuntut daripada responden pertama bagi satu perintah penghantar-serahan spesifik satu set peralatan percetakan ('peralatan tersebut') yang dibeli di bawah perjanjian sewa beli. Tuntutannya adalah berasaskan perjanjian sewa beli yang dimeterai antara kedua-dua perayu sebagai pemilik dan responden pertama sebagai penyewa peralatan tersebut. Tuntutan perayu terhadap responden kedua, ketiga dan kelima adalah berdasarkan dua dan beberapa surat jaminan dan tanggung rugi bersama pelaksanaan dan

pemerhatian perjanjian sewa beli. Dalam kes ini, perayu telah meluluskan permohonan kemudahan sewa beli responden pertama. Responden-responden telah menandatangani set pertama dokumen di pejabat perayu pada Julai 1997. Empat bulan kemudian, perayu menghantar set kedua dokumen tersebut kepada responden-responden bagi pelaksanaan semula oleh mereka. Sebab berbuat demikian adalah kerana perkhidmatan pegawai terdahulu yang menguruskan kes tersebut telah ditamatkan. Responden-responden juga diperlukan untuk membuat bayaran bagi komisyen untuk mewujudkan surat kredit. Responden pertama mengembalikan semula set kedua dokumen yang telah dilaksanakan secara eskrow kepada perayu. Perjanjian sewa beli dalam set kedua dokumen telah dimeterai oleh perayu dan bertarikh 23 Januari 1998. Berikutan penyempurnaan perjanjian sewa beli oleh perayu, jumlah pinjaman RM1 juta telah dikeluarkan pada hari yang sama, iaitu, 23 Januari 1998. Jumlah baki daripada kemudahan RM1 juta tersebut dibayar kepada responden pertama pada 27 Februari 1998. Responden pertama, dengan melanggar klausa 6 perjanjian sewa beli gagal memulangkan peralatan tersebut kepada perayu dan menafikan hak perayu untuk mendapatkannya semula. Hakim bicara memutuskan bahawa 'tiada alasan tulen yang dikemukakan oleh plaintif kerana tidak meneruskan untuk menguatkuasakan set perjanjian sewa beli yang terdahulu dan surat tanggung rugi dan jaminan yang ditandatangani oleh defendan-defendan', merujuk kepada set pertama dokumen. Tidak berpuas hati dengan keputusan tersebut, perayu merayu ke mahkamah ini. Isu-isu yang ditimbulkan untuk diputuskan oleh mahkamah ini, antara lain, adalah: sama ada terdapat perjanjian sewa beli yang sah dan boleh dikuatkuasakan yang dimeterai antara kedua-dua perayu dan responden pertama dan jika ya, sama ada perayu melanggar perjanjian tersebut dengan tidak mengambil semula peralatan; sama ada terdapat surat kredit yang sah yang diwujudkan oleh perayu berpihak kepada responden pertama; sama ada kedua-dua surat jaminan dan tanggung rugi yang dikemukakan oleh responden kedua, ketiga dan kelima adalah sah dan boleh dikuatkuasakan; dan sama ada responden kedua, ketiga dan kelima telah dilepaskan sebagai penjamin-penjamin bagi perjanjian sewa beli tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu telah memberikan penjelasan yang memuaskan sebab mengapa set pertama dokumen tidak digunakan. Semakan nota-nota keterangan menunjukkan bahawa PW1 dalam soal balas telah menjelaskan kepada mahkamah bahawa pengurusnya telah mengarahkannya untuk memastikan dokumen tersebut ditandatangani semula kerana perkhidmatan 'pegawai terdahulu yang menguruskannya telah ditamatkan'. Ia adalah budi bicara perayu dan tidak berlaku sebarang salah guna dalam menjalankan budi bicara tersebut (lihat perenggan 28(l)).

(2) Responden-responden telah memulangkan set kedua dokumen yang

telah ditandatangani secara eskrow kepada perayu tanpa pertanyaan atau teragak-agak. Selanjutnya, oleh kerana responden-responden telah menandatangani dokumen dalam eskrow, ini secara tersiratnya bermaksud bahawa mereka agak berpuas hati untuk membenarkan perayu menggunakan set dokumen ini dan memasukkan tarikh untuk menyempurnakan transaksi tersebut. Ia adalah set dokumen yang ditarikhkan sebagai 23 Januari 1998 oleh perayu. Perayu telah meletakkan 23 Januari 1998 sebagai tarikh set dokumen kedua bukan atas niat jahat tetapi kerana surat kredit telah diwujudkan pada 23 Januari 1998 dan jumlah pinjaman dikeluarkan pada hari yang sama. Selanjutnya, responden pertama tahu bahawa jumlah pinjaman hanya boleh dikeluarkan selepas surat kredit diwujudkan (lihat perenggan 28(o)).

(3) Hakim terkhilaf apabila memutuskan bahawa perjanjian sewa beli dan dua surat jaminan tidak boleh dikuatkuasakan semata-mata kerana perayu telah secara sebelah pihak meletakkan 23 Januari 1998 sebagai tarikh set dokumen kedua dan mengguna pakai set ini dan bukannya set pertama dokumen yang ditandatangani pada 30 Julai 1997. Akhirnya, hanya satu set dokumen yang disandarkan oleh perayu untuk menyempurnakan transaksi perjanjian sewa beli dan hanya terdapat satu pengeluaran kemudahan pinjaman. Ia bukanlah seolah-olah responden-responden juga dipertanggungjawabkan oleh perayu di bawah set pertama dokumen juga. Selain daripada perbezaan masa selama enam bulan, tiada prejudis yang diakibatkan terhadap responden-responden oleh perayu dengan meletakkan 23 Januari 1998 sebagai set dokumen kedua. Jika responden-responden mengalami sebarang kerugian akibat penangguhan, adalah terpulang kepada mereka untuk memplidkan set off sebagai pembelaan dan membangkitkan tuntutan balas (lihat perenggan 28(u)).

(4) Adalah menjadi kewajipan responden pertama untuk menyerah hantar peralatan selepas gagal dalam pembayaran. Tiada kewajipan kontraktual yang dikenakan ke atas perayu untuk memasuki premis responden pertama untuk mengambil semula peralatan tersebut. Walau bagaimanapun, walau apa jua kedudukan undang-undang, perayu telah cuba untuk mengambil semula peralatan dari premis responden tetapi gagal kerana perayu telah dinafikan kemasukan. Oleh itu, tiada pelanggaran bagi keperluan ini oleh perayu (lihat perenggan 30(a)–(b)).

(5) Jaminan yang diperuntukkan oleh responden kedua, ketiga dan kelima dalam kes ini, adalah jaminan spesifik. Seksyen 83 Akta Kontrak 1950 memperuntukkan bahawa jaminan berterusan mungkin pada bila-bila masa dibatalkan oleh penjamin, bagi transaksi masa hadapan, melalui notis kepada pemiutang. Walau bagaimanapun dalam kes ini, surat jaminan bagi perjanjian sewa beli tersebut adalah transaksi tunggal dan

semasa. Oleh itu, responden kedua, ketiga dan kelima tidak boleh terlepas dari tanggungjawab mereka di bawah surat jaminan bagi perjanjian sewa beli (lihat perenggan 33(c)).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.
For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1350–1371.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, CA (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134, CA (refd)
KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627, SC (distd)

Legislation referred to

Contracts Act 1950 s 83
Evidence Act 1950 ss 62, 65, 90(A), (2), (4), 114(g)
Hire-Purchase Act 1967

Appeal from: Suit No 22–113 of 1999 (High Court, Ipoh)

Hargopal Singh (Hargopal Singh & Co) for the appellant.
Augustin Nicholson (Augustine Nicholson & Associates) for the first and second respondents.
Fatin Hanum bt Abdul Hadi (Federal Counsel, Attorney General's Chambers) for the third and fourth respondents.

Mah Weng Kwai JCA (delivering judgment of the court):

THE APPELLANT'S CLAIM

[1] By its statement of claim, the appellant claimed for the following reliefs:

(a) an order for the delivery up of a specified set of printing equipment ('the equipment') purchased under the hire purchase agreement by the first respondent and if the first respondent fails to do so within 14 days of the order, the appellant shall be entitled to enter upon the premises of the first respondent to seize and take possession of the equipment;

(b) damages for the wrongful detention of the equipment;

(c) arrears of monthly rentals from 25 April 1998–8 July 1998 in the sum of RM87,752 with contractual interest thereon at the rate of 15.24% amounting to RM1,520.28 as at 8 July 1998;

(d) balance of the hire purchase price in the sum of RM1,022,644.59 less the resale value of the equipment, if any;

(e) rental for the equipment from 8 July 1998 up to the date of delivery of possession at RM27,584 per month;

(f) damages for breach of contract;

(g) interest; and

(h) costs.

[2] The appellant's claim against the first respondent was premised on a hire purchase agreement dated 23 January 1998 entered into between the appellant as the owner and the first respondent as the hirer of the equipment. The hire purchase agreement was at all material times, not subject to the provisions of the Hire-Purchase Act 1967.

[3] The appellant's claim against the second, third and fifth respondents was based on two joint and several letters of guarantee and indemnity, both dated 23 January 1998, provided by the second, third and fifth respondents to guarantee the due performance and observance of each and every term and condition in the hire purchase agreement. The appellant had withdrawn its claim against the fourth respondent previously.

[4] The appellant agreed to let and the first respondent agreed to hire the said equipment for a period of 48 months which commenced from 23 January 1998 at the hire purchase price of RM2,486,160.

[5] Apart from paying the initial payment of RM1,162,160 and rentals for the months of February and March 1998, the first respondent failed, neglected and/or refused to pay the rentals for the succeeding months.

[6] The appellant gave notice on 1 July 1998 to the first respondent stating that if the overdue and outstanding monthly rentals were not paid within seven days of the notice, the hire purchase agreement would be deemed repudiated by the first respondent. The first respondent failed to make any payment to the appellant.

[7] The appellant also issued notices of demand dated 16 July 1998 to the second, third and fifth respondents to pay the overdue and outstanding monthly rentals. In breach of their guarantee and indemnity, the second, third and fifth respondents failed and/or refused to pay the sum/s owing.

[8] The first respondent in breach of cl 6 of the hire purchase agreement failed to return the equipment to the appellant and denied the appellant's right

to repossess the same.

THE RESPONDENTS' DEFENCE

[9] Prior to 24 July 1997, the first respondent had requested the appellant for a facility of RM1m to help finance the purchase of the equipment.

[10] The first respondent executed the hire purchase agreement and the second, third and fifth respondents executed the two letters of guarantee and indemnity. The hire purchase agreement and the two letters of guarantee and indemnity were signed on 30 July 1997 at the appellant's office when the letter of offer was accepted by the first respondent (as per the evidence of SD2) (the first set of documents).

[11] On 27 November 1997 the first respondent requested the appellant to establish a letter of credit in favour of the Taiwanese manufacturers of the equipment.

[12] At the request of the appellant, the first respondent paid the sum of RM7,490.65 on 4 December 1997 to the appellant being the commission payable for establishing the letter of credit.

[13] On 4 December 1997, the appellant informed the first respondent that the first set of documents would not be utilised as the documents were attested to by an officer of the appellant company who was under investigations (see para 4(b) of the defence at *rekod rayuan* p 72). The appellant then requested the first respondent and the guarantors to execute a fresh set of the hire purchase agreement and the two letters of guarantee and indemnity (the second set of documents). The second set of documents was returned duly executed to the appellant on 5 December 1997.

[14] The appellant, without the consent of the first, second, third and fifth respondents, unilaterally dated the second set of documents as 23 January 1998 although the said documents were said to have been signed on the 5 December 1997.

[15] The letter of credit was established on 23 January 1998 in favour of the Taiwanese manufacturer of the equipment.

[16] The appellant was informed by the first respondent by letter dated 22 December 1997, signed by the fifth respondent, that the directors of the first respondent would no longer be bound by their two letters of guarantee and indemnity.

[17] The first respondent contended that as the letter of credit was established late by the appellant this had caused prejudice to the first respondent and was a material breach of the hire purchase agreement resulting in loss and damage suffered by the first respondent.

[18] After the establishment of the letter of credit on 23 January 1998, the first respondent's account with the appellant was debited with the sum of RM1m on the 23 January 1998. Of this sum of RM1m a 'balance' sum of RM62,140 was paid to the first respondent on 4 March 1998.

[19] The first respondent averred that as the appellant had failed to release the facility in accordance with the letter of offer dated 24 July 1997, the appellant was estopped from relying on the terms and conditions of the hire purchase agreement.

[20] Further, the second, third and fifth respondents averred that as the appellant had failed to abide by the terms and conditions of the letter of offer, the appellant was precluded and estopped from relying on and enforcing the two letters of guarantee and indemnity.

[21] The first respondent contended that due to the delay in establishing the letter of credit, the first respondent had suffered a loss of an additional RM1 to the US Dollar due to the increased rate of foreign exchange, in the total sum of RM203,000.

[22] On 14 October 1998, the first respondent through its solicitors, gave notice of its intention to terminate the hire purchase agreement and requested the appellant to refund the sum of RM1,162,160 to the first respondent.

DECISION OF THE HIGH COURT

[23] After a full trial, the learned trial judge held that the appellant had failed to prove its case on a balance of probabilities and dismissed the appellant's claim against the respondents with costs.

APPEAL BY THE APPELLANT

[24] Being dissatisfied with the decision of the learned judge, the appellant appealed to the Court of Appeal against the said decision.

DECISION OF THIS COURT

[25] Upon reading the record of appeal, the written submissions of counsel

for the appellant and the respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appeal with costs and set aside the order of the High Court.

[26] Being dissatisfied with the decision of the court, the respondents now apply for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[27] In this appeal the following were the main issues to be determined by the court namely:

(a) whether there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent and:

(i) whether the appellant was at liberty to vary the interest charges by increasing the rate from 2% to 3%; and

(ii) whether the appellant was in breach of the hire purchase agreement by not repossessing the equipment;

(b) whether there was a valid letter of credit established by the appellant in favour of the first respondent;

(c) whether the two letters of guarantee and indemnity provided by the second, third and fifth respondents are valid and enforceable;

(d) whether the second, third and fifth respondents have been validly discharged as guarantors in respect of the hire purchase agreement; and

(e) the admissibility of exhs P25, P26 and P27.

[28] Issue (a) — Whether there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent:

(a) the appellant by its letter of offer dated 24 July 1997 (*rekod rayuan* p 231) informed the first respondent that its application for a hire purchase facility had been approved, subject to the terms and conditions stipulated therein. The net amount financed was a maximum of RM1m. Pursuant to cl 14 of the letter of offer, the second, third and fifth respondents were required to provide a letter of guarantee in respect of the hire purchase facility granted to the first respondent. Further, pursuant to cl 15(k)(i) in the event the appellant was to establish a letter of credit, the second, third and fifth respondents were required to execute a letter of guarantee and indemnity in favour of the appellant in respect of any losses that may be suffered in view of the opening of the letter of credit;

(b) the respondents signed the first set of documents at the office of the appellant on 30 July 1997;

(c) about four months later, on 4 December 1997 (*rekod rayuan* p 238) the appellant forwarded the second set of documents to the respondents for their re-execution and return together with the payment of RM7,490.65 being the commission payable for establishing the letter of credit as the appellant did not intend to utilise the first set of documents;

(d) on the next day 5 December 1997, the first respondent returned the second set of documents duly executed in escrow to the appellant;

(e) on 22 December 1997, the first respondent wrote to the appellant (*rekod rayuan* p 266) requesting for the disbursement of the loan sum of RM1m albeit 'under protest without prejudice to our legal rights against your goodselves for breach of contract, nor does our acceptance of the same amount to any waiver of our rights';

(f) the four copies of the hire purchase agreement in the second set of documents were duly signed by one Mr Tang, the branch manager of the appellant and witnessed by Karen Oh Su Su ('PW1'). The hire purchase agreement was dated 23 January 1998 by the appellant (*rekod rayuan* p 221);

(g) the signatures of the second, third and fifth respondents as guarantors under the letter of guarantee for the hire purchase agreement were witnessed by Karen Oh (PW1) and dated 23 January 98 (*rekod rayuan* pp 224–226);

(h) the letter of guarantee and indemnity in respect of the letter of credit jointly signed by the second to fifth respondents was also witnessed by Karen Oh (PW1) and similarly dated 23 January 1998;

(i) following the completion of the hire purchase agreement by the appellant, the loan sum of RM1m was disbursed and on the same day, that is, 23 January 1998, the first respondent requested the appellant to pay the 'balance sum' from the RM1m facility to them urgently once the letter of credit was established (*rekod rayuan* p 244);

(j) subsequently on 27 February 1998, the appellant forwarded its cheque for the sum of RM62,140 being the 'balance refund sum' from the facility to the first respondent;

(k) much was said by counsel for the respondents that the appellant had failed to utilise the first set of documents which had been duly signed by the first respondent and the second to the fifth respondents on or about 30 July 1997 at the appellant's office. In fact, the learned judge accepted the contention of counsel and held in his judgment that 'no genuine grounds were put forward by the plaintiff for not proceeding to enforce an earlier set of hire purchase agreement and letter of indemnity and guarantee signed by the defendants', referring to the first set of documents;

(l) however, in our judgment we are of the view that the appellant had satisfactorily explained the reason why the first set of documents was not used. A perusal of the notes of evidence will show that Karen Oh (PW1) in her cross-examination (*rekod rayuan* p 103) had explained to the court that her manager had instructed her to have the documents re-signed by the respondents as the employment of the 'earlier officer who handled the case was terminated'. That was at the discretion of the appellant and there does not seem to be any misuse or abuse in the exercise of that discretion;

(m) counsel for the respondents submitted that Mr Tang, the branch manager ought to have been called as a witness by the appellant. It is trite that not every person involved in a transaction need to be called as a witness. In this case, the important and material witness was PW1 as she was effectively the officer who had witnessed the respondents' signatures. Mr Tang was merely present in his capacity as a manager;

(n) this court is not prepared to accept the finding of the learned judge that the evidence of PW1 was 'unreliable, inconsistent and contradictory' when she explained the need for the documents to be re-signed;

(o) the second set of documents was signed in escrow by the respondents and duly returned to the appellant on 5 December 1997. It will be noted that the respondents had returned the second set of documents duly signed in escrow to the appellant without any query or reservation whatsoever. The respondents merely complied with the request of the appellant without so much as asking as to why it was necessary to re-sign the documents. Further, as the respondents had signed the documents in escrow, this impliedly meant that they were quite happy to let the appellant utilise this set of documents and to insert the date to complete the transaction. It was this set of documents that was dated 23 January 1998 by the appellant. Thus it would appear erroneous for the learned judge to hold that 'the hire purchase agreement was signed sometime in November 1997 and was not completed. It was later unilaterally and with bad faith dated by the plaintiff on 23 January 1998'. Significantly, the second set of documents which was dated 23 January 1998 by the appellant was only returned by the first respondent on 5 December 1997. Hence it could not have been the same set of documents said have been signed sometime in November 1997. As explained by PW1, as the first set of documents was not being utilised, the respondents were requested to re-sign the documents. It would appear that the appellant had dated the second set of documents on 23 January 1998 not out of 'bad faith' but because the letter of credit was only established on the 23 January 1998 and that the loan sum was disbursed on the same day;

(p) thus, the court is of the view that the learned judge was in error when he held that the appellant had with bad faith inserted the date of 23 January 1998 'to overcome the situation of an unenforceable contract and to

circumvent the unfair practices and consequently a situation of resulting in an unenforceable contract' and that 'the transactions and correspondences formed part and parcel of the first set of the hire purchase agreement and guarantee and indemnity documents entered between the parties';

(q) the court is further of the view that there was no bad faith on the part of the appellant in dating the second set of documents on 23 January 1998 as the first respondent well knew that by its letter of 23 January 1998 (*rekod rayuan* p 244) the loan sum could only be disbursed after the letter of credit had been established;

(r) as a matter of fact, at all material times, the date of the second set of documents did not matter a jot to the respondents at all as they were only interested in the release of the loan sum;

(s) the respondents did not at any time deny the existence of the second set of documents nor their signatures thereon. What they have complained about is the unilateral dating of the second set of documents on 23 January 1998. However, the court is of the considered view that nothing turns on this as the respondents have expressly admitted to signing the second set of documents in the statement of agreed facts. The first respondent has had the full benefit of the loan sum and it will be unconscionable on its part to now deny liability merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and not on 5 December 1997, the date of the letter enclosing the documents returned by the first respondent to the appellant. The truth of the matter is that the first respondent would not have obtained possession of the equipment if not for the loan facility granted by the appellant;

(t) furthermore, the first respondent had accepted the balance sum of RM62,140 from the appellant on 4 March 1998 without any objections;

(u) the court is of the view that the learned judge fell into error when he held that the hire purchase agreement and the two letters of guarantee were unenforceable merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and had utilised this set of documents instead of the first set of documents signed on 30 July 1997. At the end of the day, only one set of documents was relied on by the appellant to complete the hire purchase transaction and there was only one drawdown of the loan facility. It is not as though the respondents are also being held liable by the appellant under the first set of documents as well. Apart from the time difference of about six months, no prejudice has been caused to the respondents by the appellant dating the second set of documents on 23 January 1998. If the respondents had suffered any loss due to the (purported) delay, it was entirely up to them to plead a set

off in defence and to raise a counterclaim. The use of the second set of documents would not legally entitle the respondents to disclaim liability under the hire purchase agreement and the two letters of guarantee respectively, especially since the respondents have derived the full benefit of the loan facility;

(v) counsel for the respondents also submitted that the appellant had failed to tender the first set of documents as exhibits and had also failed to adduce evidence to show that the first set of documents had been revoked.

On this point, the court holds that there was no evidence adduced to suggest that the first set of documents had in fact and in law come into force and was binding on the appellant and the respondents. As such there was no issue of having the first set of documents revoked as the same was not in use at all material times. It therefore follows that the non production of the first set of documents as an exhibit was not a material omission; and

(w) accordingly, in our judgment we hold that there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent. The court disagrees with the finding of the learned judge that 'the cumulative effect of the plaintiff's conduct on the set of facts tantamount to misrepresentation of the true facts which had resulted the defendants to act to their detriment as testified by the defendants'.

[29] Issue (a)(i) — Whether the appellant was at liberty to vary the interest charges by increasing the rate from 2% to 3%:

(a) the short answer to this point is in the affirmative as the appellant, pursuant to cl 28 of the terms and conditions in the letter of offer dated 24 July 1997 had reserved the right to vary or change the terms of the offer for the undrawn portion as at the date of such notice of variation or change. And notice of the relevant increases had been given by the appellant to the first respondent (*rekod rayuan* p 246). The amended terms and conditions were accepted by the first respondent as it had signed in acknowledgement on the said letter. The record also shows that the first respondent had paid rentals to the appellant at the revised rate; and

(b) in any event, as pointed out by counsel for the appellant, this was not one of the agreed issues to be tried.

[30] Issue (a)(ii) — Whether the appellant was in breach of the hire purchase agreement by not repossessing the equipment:

(a) cl 5(a) of the hire purchase agreement (*rekod rayuan* p 222) provided that

in the event the hirer 'shall make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the Agreement, the hirer shall forthwith at the hirer's expense deliver up the said goods to the owner'. Thus it was incumbent upon the first respondent to deliver up the equipment upon its default of payment. There was no contractual duty imposed on the appellant to enter the premises of the first respondent to repossess the equipment;

(b) however, notwithstanding the legal position as stated above, the appellant did on 5 October 1998 attempt to repossess the equipment from the first respondent's premises but without success as the appellant was denied entry. This attempt by the appellant drew a sharp rebuke from the solicitors acting for the first respondent by its letter dated 14 October 1998 (*rekod rayuan* p 263). Needless to say, the solicitors were labouring under a serious mistake of law by insisting that the first respondent could exercise a lien or security over the equipment until the appellant had refunded the sum of RM1,162,160 being the loan sum and 'the balance refund' to the first respondent!; and

(c) the court is satisfied that there was no breach of this requirement by the appellant. Further the court is of the view that no adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the appellant for not calling the two repossessors, Lee Thim See and Gong Sim Cheong, in the circumstances, although their names had been mentioned by PW3.

[31] Issue (b) — Whether there was a valid letter of credit established by the appellant in favour of the first respondent:

(a) it was not disputed that the first respondent had paid the commission fees of RM7,490.65 to the appellant for the establishment of the letter of credit on 4 December 1997 and that the letter of credit was established on 23 January 1998. No doubt there may have been a slight delay on the part of the appellant in the establishment of the letter of credit but the validity of the letter of credit cannot be doubted or challenged at any time as the disbursement of the loan sum could only be effected after the letter of credit had been established. As at 23 January 1998, the first respondent had no objection at all to the letter of credit being established albeit belatedly, as the first respondent by its letter of 23 January 1998 had requested for the payment of the balance sum from the RM1m facility urgently; and

(b) it would appear that the respondents may have a valid ground to complain against the appellant for having delayed the establishment of the letter of credit of about one and a half months (from 5 December 1997), thereby delaying the business operations of the first respondent and resulting in alleged losses suffered. It was not disputed that the first

respondent did in fact suffer on additional expense of RM203,100 when securing the letter of credit due to the increase in the exchange rate between the Ringgit and the US Dollar in January 1998. Be that as it may, the first respondent has however not claimed for its losses by way of a set-off and counterclaim. With respect, the court is unable to see just how the first respondent can deny its liability to repay the appellant for money had and received without having properly pleaded its case by way of a set-off and counterclaim merely on the ground that there was a delay on the part of the appellant in establishing the letter of credit. Accordingly, the court is of the view that the first respondent is liable under the terms of the letter of credit.

[32] Issue (c) — Whether the two letters of guarantee and indemnity provided by the second, third and fifth respondents are valid and enforceable:

(a) as previously mentioned under issue (a), the second, third and fifth respondents were required under cll 14–15 of the terms and conditions in the letter of offer to furnish the letter of guarantee in respect of the hire purchase agreement (*rekod rayuan* p 224) and the letter of guarantee and indemnity in respect of the letter of credit (*rekod rayuan* p 227) to the appellant respectively. This the second, third and fifth respondents did and the two letters of guarantee and indemnity were accepted by the appellant; and

(b) the two letters of guarantee and indemnity were signed in escrow by the second, third and fifth respondents and were returned without qualification to the appellant. This meant impliedly at the least, that the second, third and fifth respondents knew or ought to have known that the two letters of guarantee and indemnity would be unilaterally dated by the appellant. There can be no issue of the two letters of guarantee and indemnity coming into effect before the letter of credit was established on 23 January 1998. This is simply because the two letters of guarantee and indemnity and letter of credit were similarly dated on 23 January 1998 and thus became effective on the same day.

[33] Issue (d) — Whether the second, third and fifth respondents have been validly discharged as guarantors in respect of the hire purchase agreement:

(a) the second, third and fifth respondents contended that they had signed the letter of guarantee on 5 December 1997 before the letter of guarantee together with the hire purchase agreement were returned undated to the appellant under cover of letter dated 5 December 1997 (*rekod rayuan* p 267). As the letter of guarantee was only dated on 23 January 1998 by the appellant, the letter of guarantee cannot be said to be effective from 5 December 1997. The letter of guarantee only came into effect on 23 January 1998. As the letter of credit was also established on 23 January

1998 itself there can be no issue of the letter of guarantee being 'unenforceable on the ground that the Letter of Credit cannot operate retrospectively' as was wrongly held by the learned judge. There was no issue of any retrospectivity in this case;

(b) the second, third and fifth respondents purported to revoke the letter of guarantee signed by them on 5 December 1997 when on 22 December 1997, the first respondent wrote to the appellant (*rekod rayuan* p 266) giving notice on behalf of the directors of the company that the letter of guarantee was no longer binding on them. This notice in our view cannot be effective as the purported notice was given by the first respondent and not by the second, third and fifth respondents personally; and

(c) be that as it may, the court is of the further and considered view that as the letter of guarantee for the hire purchase agreement, which is an indemnity as well as a guarantee, does not attract the provisions of s 83 of the Contracts Act 1950 as s 83 only applies to a continuing guarantee and not to a specific guarantee. The guarantee provided by the second, third and fifth respondents in this instance is a specific guarantee. Section 83 provides that a continuing guarantee may at any time be revoked by the surety, as to *future* transactions, by notice to the creditor. However in this case, the letter of guarantee in respect of the hire purchase agreement was a single and current transaction.

Hence, the second, third and fifth respondents cannot be relieved of their liability under the letter of guarantee in respect of the hire purchase agreement.

[34] Issue (e) — Admissibility of exhs P25, P26 and P27:

Counsel for the respondents submitted in his written submission that:

> SP3 had not tendered a single piece of evidence to prove that the computer was in good working order and was operating properly in all respects throughout the material part of the period during which P25, P26 and P27 were produced. Hence the requirements of s 90A(4) was not established and therefore P25, P26 and P27 are inadmissible as evidence of the facts stated therein without which the appellant's claim fails as the appellant's claim solely rested on P25 and P26.

(a) pursuant to the statement of balance payable as at 8 July 1998 the total balance sum due from the first respondent was RM1,022,644.59. This document was admitted in evidence and was marked P26 by the learned judge. And pursuant to the statement of balance payable as at 10 July 2006, the total balance sum due and owing by the first respondent was RM2,438,545.48. This statement too was admitted in evidence and was marked as exh P25;

(b) surprisingly, in his submissions, counsel for the respondents contended that all these computer generated exhibits ought not to have been

admitted in evidence by reason of the non compliance with s 90A(2) and 90A(4) of the Evidence Act 1950. Section 90A(2) and 90A(4) of the Evidence Act provides:

> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.
>
> (4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

The alleged non compliance with s 90A(4) cannot be an issue simply because when these documents were tendered in court as exhibits through PW3, Maathir bt Mohd Ghazali, counsel for the second, third and fifth respondents did not raise any objections thereto (*rekod rayuan* pp 135–137). Save to have the cross-examination of PW3 on the statements as to the accuracy of the amounts stated therein the cross-examination of PW3 did not detract from having the documents admitted in evidence. Further, the learned Judge had in fact marked the documents as exhs P25, P26 and 27 by consent and there is no valid ground in law to exclude the three documents from the evidence. To do so now would be to cause an injustice to the appellant as it will be deprived of the opportunity of calling a witness to prove that the computer that produced exhs P25, P26 and P27 was in good working order in the course of its ordinary use and in compliance with s 90A(2) and 90A(4) of the Evidence Act. No certificate was needed to be produced by the appellant as there was no objection to the three documents being tendered as exhibits by counsel for the respondents;

(c) as for the veracity or accuracy of the figures stated in exhs P25, P26 and P27, there is no reason for the court not to attach any weight to the evidence as the records were kept and the figures produced by the appellant in their ordinary course of business. Further s 62 of the Evidence Actprovides that documents produced by a computer are primary evidence. Besides, apart from the respondents criticising the inaccuracy or discrepancy of the contents in exhs P25, P26 and P27, the respondents themselves have failed to show what the actual figures should have been. It was incumbent on the respondents to dispute the figures right from the time the first letter of demand was issued by the appellant;

(d) counsel for the respondents also complained that the appellant had failed to produce the 'files or record books' in support of exhs P25, P26 and P27. The court is of the view that if the appellant was required to do so,

this would have defeated the very purpose of the appellant producing the computer generated documents under s 90(A) of the Evidence Act in the first place!;

(e) in support of his argument that the maker of the summary of the accounts ought to have been called to prove the facts and particulars stated therein were correct and the basis of the calculation of the amount claimed, especially since the record books upon which the maker based the summary was not produced in evidence, counsel for the respondents cited the case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 in support where His Lordship Mohamad Dzaiddin SCJ (as he then was) held that it was wrong in law to rely on a summary of accounts without calling the maker as a witness and that it was a well established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s 65 of the Evidence Act 1950. However, we are of the view that this case can be easily distinguished and that it does not apply to the present case in that *KPM Khidmat Sdn Bhd* was a case dealing with documents under s 62 of the Evidence Act and not computer generated documents admissible under s 90(A) of the Evidence Act; and

(f) accordingly, we are of the view that the three documents were correctly admitted into evidence (see cases of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613, *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1 and *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134).

CONCLUSION

[35] In the result, the appeal was allowed with costs.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed